

1 having appeals attempt to develop facts? I know that
2 with business taxes that sometimes happens, the
3 conference holder tries to develop additional facts, but
4 isn't it more appropriate for FTB to do that?

5 MR. HELLER: It absolutely -- this is Bradley
6 Heller. In most of these cases it absolutely just
7 depends on the situation. And many times what we see in
8 income tax appeals is that the briefings seem to
9 diverge, and basically both people -- or the FTB and the
10 taxpayer are talking about stories that are somewhat
11 different, that have different legal approaches to how
12 the facts should be handled and cite different documents
13 as being operative and refer to different historical
14 facts occurring and people having said things, and
15 really it's something that just can't be resolved by
16 having FTB tell us what they still think is the
17 situation, since they've already briefed us on exactly
18 what they thought was the situation.

19 And for us to just request additional briefing,
20 which we basically do have authority to do right now,
21 still just gets us continuing, you know, responses of
22 the same material. Sometimes it improves, sometimes it
23 doesn't, but at the cost of additional time.

24 MS. MANDEL: This is Marcy. If the problem is
25 that we're getting two different stories, which sounds

1 like two different factual stories, and what are the
2 facts based on the evidence that's been presented, the
3 tax court on which I thought you had modeled -- tried to
4 model all your stuff, there's a requirement that the
5 parties stipulate to the facts to the greatest extent
6 possible, including the documents that come in.

7 And so if it's just that there are factual
8 disputes that you want some other staff person in
9 appeals to sit and listen to the two factual sides, hear
10 it orally so that maybe they make a decision -- you
11 know, say, well, you know, we think FTB's fact is right
12 and not -- you know, I mean, I don't know how -- in a
13 stipulation process years ago I think I tried to do
14 stipulations and it was, like, oh, we don't do that.
15 But if it's a factual issue, then that's, you know, one
16 thing.

17 If it's an interpretive issue, we both agree
18 that this is the document, this is the agreement, and
19 then they're arguing off of that as to what it means,
20 you know, legally, they're not going to agree on what it
21 means legally, because otherwise the case wouldn't be
22 before the Board. But if it's factual stuff that can be
23 resolved by stipulation, maybe we ought to be
24 encouraging stipulation. I don't know.

25 MR. LANGSTON: And, you know, in most cases we

1 try to point that out in our briefs. You know, we say
2 here are the facts at issue, here's what we disagree on,
3 here's what we don't know. But that is a possibility
4 for -- I'm still trying to get an idea behind, are we
5 talking about complex cases? Are we talking about
6 simple cases? Are we talking about unrepresented
7 taxpayers? Because in the complex cases, absolutely, it
8 would help to have a stipulation of facts. In the
9 simple cases, it's the facts. No one is worried about
10 the law. It's, where did the child live? When was this
11 filed? You know, did you reinvest your IRA? That kind
12 of stuff that -- again, we try to point that out in our
13 written submissions.

14 And in those cases, I mean, one of the issues
15 always is, well, how can we prove this? What evidence
16 would be appropriate?

17 So, I mean, I can see in cases where there was
18 that kind of factual dispute, where there isn't the best
19 evidence, but somebody wants to testify or, you know,
20 somehow prove something indirectly, that might be
21 appropriate not to bring before the full Board, but to
22 get resolved, you know, with the Board staff and our
23 staff and the taxpayer.

24 MR. HELLER: We're going to have to move on.
25 We've really got two whole articles to still cover, and

1 we have a half an hour to do that and --

2 MR. KOCH: One short comment, if I may? Al
3 Koch. I'm surprised this is at the conclusion of
4 briefing rather than at the beginning of briefing.
5 That's all I can say.

6 MR. HELLER: I can understand that surprise.
7 And actually, the Board staff does not have any
8 information on an appeal until all the briefings have
9 been filed.

10 MR. KOCH: On the FTB, I see.

11 MR. HELLER: Because we're just the Board and
12 we're not in audit and we're not --

13 MR. FOSTER: In a business tax case there's a
14 petition filed, and in an FTB case we have no record to
15 work from.

16 MR. HELLER: It is a big distinction.

17 MS. RUWART: Any other big, distinctive
18 comments that can't be submitted in writing?

19 MR. DAVIS: Just one other -- Ken Davis -- just
20 one issue, and that's just, from what I understand, the
21 length of time of this is going to be -- it may be
22 substantial only because you've got the equivalent of a
23 hearing officer and the procedures and then having a
24 hearing. You've got a hearing officer preparing a
25 D & R, then that goes to the Appeals Division, as I

1 understand it, and the Appeals Division has the
2 opportunity to modify or -- reject, modify, or amend the
3 D & R, and then it goes to the Board.

4 MS. RUWART: It takes a long time.

5 MS. PELLEGRINI: Just a real quick
6 clarification from a business tax standpoint. Case
7 management gets to have their appeals to schedule. It
8 could take anywhere, depending on the particular
9 district office the taxpayer wants it in, from a couple
10 of days to a year to get one scheduled, particularly if
11 it's in a very obscure place like Eureka or Redding or
12 something like that. If it's, like, Culver City or
13 something like that, they go down regularly. It's a
14 60-day notice. Then the appeals conference is held, and
15 then they get three months in which to write the D & R.
16 When that is completed, then it goes up to discussion
17 for hearing. So we are looking at a minimum of six
18 months away.

19 MS. RUWART: Okay. Section 4040(a),
20 Scheduling. This probably addresses at least, answers
21 some of the questions, Board proceedings, contact of
22 parties, schedules, the appeals conference, and talks
23 about the appeal held by various means, and scheduling.

24 Is there any substantial comment on these?

25 Okay. Subsection (b), the Notice?

1 Subsection (c), the Response to Notice and a
2 Waiver?

3 MR. PENILLA: This Jess Penilla.

4 I have a question, and maybe this has already
5 been answered. Once a decision and recommendation is
6 issued, will these decisions and recommendations be
7 available to the public or published as Board decisions
8 are?

9 MS. MANDEL: They're not Board decisions.

10 MR. HELLER: Definitely not.

11 MR. VINATIERI: D & Rs, on the business tax
12 side, are available on a redacted basis.

13 MR. PENILLA: That's why I'm asking the
14 question.

15 MR. HELLER: They could be released in a
16 redacted version pursuant to a Public Records Act
17 request. And they're obviously provided to the parties.
18 And they'd even become record of public, they will be
19 part of the record, for a Franchise Tax Board appeal if
20 they're adopted by the Board.

21 MR. PENILLA: I'm wondering about -- it's
22 always better to have items for taxpayers, and if these
23 issues are coming up, and there's been a decision
24 recommendation, it's always good to know that because
25 you may not need to pursue your case.

1 MR. BRADLEY HELLER: These would not be
2 precedential, in terms of precedential value at all.

3 MR. PENILLA: I understand that.

4 MR. LANGSTON: Bruce Langston.

5 One comment on (c)(4). Are you sure that we
6 want to, if the taxpayer doesn't respond, that FTB gets
7 to go lobby the Board staff? I mean, I have a feeling
8 FTB is pretty much always going to send someone, but I'm
9 not sure if -- I mean, the way this reads, taxpayer
10 doesn't show up, FTB staff gets to go and argue their
11 case to the Board, which we currently do not do.

12 And I'm just pointing that out, that, you know,
13 I'm a little surprised to see that.

14 MR. VINATIERI: This is Joe.

15 That's consistent with the way business tax
16 appeals are.

17 MS. MANDEL: Except in business taxes appeals,
18 the appeals division, so denominated, is actually part
19 of Board staff as are the Board auditors who conducted
20 the audit in the first place as is the Board the
21 administrator of the tax.

22 So in the franchise tax context, it's, you
23 know, completely different. The Board members all have
24 their own personal staff to advise them of how
25 they -- what the law is and the facts are on the cases

1 coming before them. And if you do this process of
2 taking what is a fair and neutral presentation by the
3 appeals division to the Board members in hearing
4 summaries and set up an appeals conference procedure
5 where you expect that appeals hearing, that appeals
6 person, to actually conduct some kind of hearing
7 and reach a conclusion, not, you know, mutually making a
8 presentation to the Board, but actually of the party's
9 position, but actually making a conclusion, then, as
10 Bruce says, if the taxpayer who is the one who was filed
11 the appeal whose right it is to have the hearing and
12 everything else decides that they're not going to go sit
13 down and talk to this person from appeals, then you do
14 have -- and you have FTB come in, then it is -- that,
15 you know, falls into whatever happens on -- I mean, FTB
16 would view that, I guess, as sort of, you know, an
17 ex parte thing.

18 Of course if the rule provides for it, then
19 they can do it. He's just, you know, pointing --
20 pointing that out, that it's kind of the taxpayer's
21 right to have that kind of hearing.

22 MR. VINATIERI: It's a choice.

23 MR. FOSTER: This is Ian.

24 That point by Bruce and Marcy is very well
25 taken. And really more what I was envisioning, and I

1 hadn't thought about it when I thought about the
2 language, was FTB saying, oh, this is some simple
3 penalty case, I don't want to go to the expense of
4 sending an attorney to it, and the taxpayer can still
5 show up and make their case if they want to.

6 MR. HELLER: On the reverse side, I think we
7 were concerned that taxpayer control the ability for the
8 FTB to have an appeals conference. If the taxpayer
9 wants to prevent the FTB from meeting with us, they can
10 always just not show up or waive that conference and
11 then now we don't really achieve any of our goals. So
12 those were concerns, but we definitely weren't looking
13 at it from the perspective of maybe creating a potential
14 additional questionable communication.

15 MS. MANDEL: I guess it all depends on what is
16 the ultimate goal.

17 MR. HELLER: We'll definitely take that into
18 consideration.

19 MS. RUWART: Good comments.

20 Anything else on Subsection (c)?

21 Subsection (d), Rescheduling?

22 Subsection (e), the Conduct and Nature of the
23 Appeals Conference?

24 And, again, we will take comments after this.
25 This is not your last opportunity.

1 And Subsection (f), Submission of Additional
2 Briefing and Evidence, basically the conference holder
3 can ask for anything additional that the conference
4 holder feels they need.

5 Moving on to Section 4041, the Decision and
6 Recommendation. Ian, is there anything -- what would
7 you like to highlight in this section?

8 MR. FOSTER: If you're familiar with the
9 business taxes procedures, the D & Rs define very much
10 the same -- includes basically the same kinds of
11 requirements of what has to appear in the D & R. It's
12 just rephrased a little bit to fit the FIT situation
13 better. And it just clarifies, too, that if everybody
14 waives their right to appeals conference and one is not
15 held, then a D & R is still prepared based on the
16 written --

17 MS. MANDEL: And this is a significant change
18 from practice over the last, I don't know, since the
19 early '90s. Very, very significant proposed change.

20 MS. RUWART: Do you want to say a little bit
21 more about that?

22 MS. MANDEL: Well, because, as I said, what
23 Appeals Division has been charged with for many, many
24 years is for presenting the members with a fair and
25 neutral presentation of the facts in the case and the

1 arguments made by both sides. And perhaps, you know,
2 the -- how those have been done more recently may not,
3 you know, include sufficient neutral -- sufficient
4 analysis on a neutral basis of those arguments. They
5 may have just been cut-and-paste jobs, and maybe they
6 have not been serving their purpose as well. But to
7 have an affirmative finding, if you will, by a lawyer in
8 the appeals section is a radical change from what the
9 Board has been doing.

10 MR. LANGSTON: But is that really different
11 than the hearing summary we get now before hearings? I
12 mean, we haven't talked about that yet, but . . .

13 MS. MANDEL: It would be.

14 MR. FOSTER: It's different from the hearing
15 summaries. This is Ian again. Currently, in the vast
16 majority of cases, we issue what we call summary
17 decisions, which are findings --

18 MS. MANDEL: Those are where people have --
19 right -- those are where people have waived their
20 hearing. Those are where people have waived their
21 hearing, where the Board has taken a case under
22 submission and it comes back at a later date on a
23 nonappearance calendar. And in some rare instances, in
24 the latter situation, the Board has actually said, you
25 know, you don't need to prepare anything. We just need

1 to think about it further.

2 But for cases where there is an oral hearing
3 before the Board, this would be a radical departure from
4 what has been the practice, so that the hearing summary
5 would now be something where you actually have a staff
6 lawyer for the Board making a -- I don't know what to
7 call it -- making an interim decision, if you will.

8 MS. RUWART: Thanks. I just wanted to repeat
9 that for the -- to make it with that section.

10 That said, we've had the global comments about
11 the decision and recommendation. Is there anything on
12 subsection (a) that just requires the Appeals Division
13 to prepare the D & R? Subsection (b) provides, if no
14 appeals conference, what do we do? Subsection (c) is
15 the contents of the decision and recommendation. And
16 aside from the substantive issues that Marcy just said,
17 is there anything --

18 MR. SMITH: One quick comment on (c). Is
19 there, like, a section for finding of fact, where the
20 hearing officer is actually going to be the finder of
21 fact, and if there's a dispute, a factual dispute,
22 they're going to come down one way or the other on a
23 factual dispute?

24 MR. FOSTER: Yeah. I think we can envision
25 there being findings of fact. I guess it wasn't phrased

1 that way, but . . .

2 MS. MANDEL: The issue being legal or factual;
3 is that your understanding?

4 MR. FOSTER: Yes.

5 MR. KOCH: Al Koch. I wonder if this might
6 work better if there wasn't a recommendation and
7 decision, and instead of that, you have what would be an
8 expanded summary of the case that would contain agreed
9 facts, contested facts, points of difference on the law,
10 and just lay out the case objectively for Board members,
11 subject to objection by either party if they didn't like
12 that summary or they disagreed with some part of that
13 summary, rather than having either side feel that,
14 uh-oh, here we're going in with the decision-maker, the
15 adjudicating agency already against us.

16 I think if I were a party that were involved in
17 that, I would feel that the objectivity of the Board
18 member decision had been prejudiced. And I think
19 it's -- I don't think it's really helpful in that
20 respect to the whole process. But I do think there's a
21 function that I see you reaching for that might be
22 appropriate, because the hearings I've been
23 participating in on local tax allocations all involve
24 D & Rs. And, frankly, there hasn't been a lot of
25 factual contest over those situations. And we only had

1 a few hearings. Probably will be.

2 But I just -- I feel that if you had a really
3 objective, full statement of the case in summary form,
4 that that would certainly make me feel that the
5 adjudicating agency is objective rather than
6 unobjective, which I think you want.

7 MS. RUWART: Okay.

8 MR. FOSTER: If I could ask clarification, Al,
9 would you say that generally you would prefer more of an
10 idea along the lines of a prehearing conference where,
11 just in the cases where it goes to Board hearing, that
12 there's a conference, and then out of that comes more of
13 a detailed expanded hearing summary that --

14 MR. KOCH: Yes.

15 MR. FOSTER: -- tries to resolve a lot of
16 outstanding issues before it goes to --

17 MR. KOCH: Yes. And I would make that summary
18 fully available to both sides so that they could then
19 express written disagreement in advance of the hearing.

20 MS. RUWART: Chris? Anybody? Okay. Great.
21 Very good comments.

22 MS. CROCETTE: I'm sorry, Carole. This is
23 Sabina Crocette. I don't have a problem with the format
24 we have now. That's why the Board members have their
25 own staff do a thorough review. And they usually -- you

1 know, they do know that that is an argument and that is
2 an opinion, and that's what they are there for, to vet
3 whether or not they agree with that, to ask questions,
4 et cetera, so I don't think that necessarily changing
5 the format is going to get at another answer. That's
6 just my opinion.

7 MS. RUWART: So, in other words, the fact that
8 a D & R reaches a conclusion you don't think unduly
9 prejudices the Board one way or the other?

10 MS. CROCETTE: It's my opinion that the Board
11 members have their own staff, and they don't just go,
12 oh, okay, well, that's okay, check, check, check. I
13 mean, they do if -- if it doesn't sound right to you,
14 you make a call, you check on it.

15 So I'm just saying that that's an opinion.
16 This is just another -- from reading them from that
17 side, I don't think that they preclude any further
18 analysis or you just automatically agree because someone
19 else said it.

20 MS. RUWART: Okay. Thank you. That's a
21 valuable perspective.

22 Moving on to Section 4042, the Board hearing
23 details. Is there anything significant here, Ian? Or
24 is this part of consolidation and reorganization?

25 MR. FOSTER: Yeah. This is -- I mean, it takes

1 a lot of the provisions that were in the prior version
2 that we posted in September and just sort of reorganized
3 it in a way that makes it make more sense in the context
4 of appeals conferences.

5 MS. RUWART: So subsection (a), it's the time
6 and manner of making a written request for an oral
7 hearing. Any comments on that?

8 MS. BORGMAN: Well, we appreciate the right to
9 request an oral hearing.

10 MS. RUWART: I see.

11 MS. MANDEL: Yes. Right.

12 MS. RUWART: Subsection (b), denial of request
13 for an oral hearing. And this goes back to the waiver
14 issue of, you know, what is one of the potential
15 consequences of waiving the appearance.

16 Subsection (c)?

17 MS. MANDEL: Wait a minute. Wait a minute.

18 So in (a), and the reason you'd get, would get
19 the right, is because of course it's only appeals staff.
20 But in (b), then, if someone said that's okay, do the
21 appeals conference on the written record, then they have
22 no right?

23 MR. LANGSTON: We're talking about the hearing
24 before the Board. This is 4042 we're talking about.

25 MS. MANDEL: Right, 4042, but in (b) it says,

1 you -- if -- if -- if you -- if at the D & R it comes
2 out and you say, "I want a hearing before the Board.
3 What did this guy write? I want a hearing before the
4 Board." (b) says, you don't get that hearing before the
5 Board if you waived your right to show up at the appeals
6 conference.

7 MR. VINATIERI: Well, small business -- small
8 tax -- this is Joe.

9 MR. FOSTER: It's both to clarify -- well,
10 first of all, it's clarifying the small tax and HRA
11 cases as we talked about earlier.

12 MS. MANDEL: Right.

13 MR. FOSTER: It also clarifies that regardless
14 of what kind of case we're talking about, if you waive
15 an appeals conference, you don't challenge the
16 D & R -- and here's the reason for that. It's because a
17 lot of the reasons for having the appeals conference in
18 the first place are defeated if people don't show up and
19 go straight to the Board anyway.

20 MR. HELLER: So the problem is then
21 transferred.

22 MR. FOSTER: Then the appeals division hasn't
23 been able to dig into the case, get more issues resolved
24 or anything like that, then there's no point in having
25 the appeals conference.

1 MS. MANDEL: So if -- so if a taxpayer thinks
2 he's made an adequate case in writing, doesn't want to
3 go to the expense of showing up at an appeals conference
4 or paying his representative to go to an appeals
5 conference because they feel pretty good that only a
6 fool would conclude against them having read their
7 papers, and then the fool concludes against them having
8 read their papers, then he again has no right to a
9 hearing.

10 MR. FOSTER: Then the right is to file a
11 petition for rehearing. And that is essentially the
12 same, substantively that is the same as it works right
13 now, where a taxpayer says, I have done a great job on
14 my written briefing, and only a fool would rule against
15 me, and I waive my right to oral hearing. Then the
16 summary decision comes out that says, no, you lose.
17 It's the same way it works right now.

18 MS. MANDEL: All right, I understand that, but
19 here again it's the -- it's an attorney in the appeals
20 division rather than the Board.

21 MR. FOSTER: Well, the Board still has to adopt
22 the D & R just like they have to adopt a summary
23 decision.

24 MR. LANGSTON: Would you be happier if this
25 last sentence about they may in their discretion if

1 there was a procedure for --

2 MS. MANDEL: Well, that, they don't want to put
3 a procedure for the Board in the rules.

4 MR. LANGSTON: How is the Board going to order
5 it?

6 MS. MANDEL: That was my question before.
7 Typically now all these summary decisions, for example,
8 go on a, you know, they go on a nonappearance calendar,
9 and then if a Board member, for whatever reason, whether
10 it's required to be pulled off a consent calendar
11 because of a Kopp Act type issue or because the Board
12 member has a question and wants to talk to staff about
13 it, or, you know, because you don't want to adopt that
14 decision for whatever other reason you might have, it
15 almost seems like that would be the time.

16 And we get a long -- I mean, those
17 nonappearance calendars are very, very long, so you
18 would have to not only look at it to say, I agree or
19 don't agree with the summary decision, all you get is
20 that summary decision, you would have to conclude from
21 reading whatever they presented in this D & R that you
22 think an oral hearing would be useful or you want to
23 have an oral hearing, which is different than just
24 deciding that you want to pull it off consent and when
25 it comes back on an adjudicatory nonappearance, make a

1 pitch for reaching a different conclusion.

2 And there's no particular way for -- you know,
3 then our Board office is going to get a bunch of sort of
4 calls and contacts about, you know, please, please -- I
5 mean, I just sort of wonder how it's all going to play
6 out from a practical standpoint.

7 MS. PELLEGRINI: This is Deborah Pellegrini.

8 Because this does depart from our present
9 procedures because our present procedures is up to the
10 day, the day before the hearing, if you're on a
11 nonappearance calendar, you say, no, I want an oral
12 hearing, we'll give you an oral hearing.

13 MS. RUWART: Okay. Any other questions on (a)
14 and (b), taken together?

15 Okay. Ian, could you just briefly explain (c),
16 unless it was transported over from something else.

17 MR. FOSTER: (c) is -- I don't remember how it
18 was numbered before, but it was -- it's existing
19 practice and it was in the prior order.

20 MR. LANGSTON: One comment I had was, you know,
21 in a lot of innocent spouse cases, there might not be a
22 court order but the parties really would prefer not to
23 have it together, so maybe soften that a little bit to
24 let the taxpayers, you know, not have to deal with each
25 other.

1 MS. MANDEL: Not have to be in the room at the
2 same time.

3 MR. FOSTER: Our previous practice is, and I
4 imagine it would continue is to say, okay, you can have
5 it at 9:00, and you can have it at 10:00. That's
6 basically what we do now, is shuffle one person out of
7 the room.

8 MS. BORGMAN: But in sub (b) you said, "There
9 shall be one oral hearing."

10 MR. LANGSTON: Maybe let -- maybe just expand
11 it, the court order, to good cause or something like
12 that.

13 MS. RUWART: Yeah, Court will reasonably order
14 it if they were before them.

15 Subsection (d), this is the appeals division
16 preparing the hearing summary. Is everybody clear on
17 that, what document it is and how that relates?

18 MR. DAVIS: This is Ken Davis.

19 I'm not, because -- Ian, if you could clarify,
20 because you have dropped out the section on hearing
21 summary in the old, and so we've got -- we're in the
22 D & R stage. I thought the Board is going to be
23 approving or considering the D & R.

24 MR. FOSTER: Only if no hearing is requested.

25 MS. MANDEL: Can I make a suggestion? This is

1 Marcy.

2 There are a lot of people who have experience
3 with this in tax cases where we have the D & R and then
4 there's actually a hearing summary that's prepared for
5 the Board meeting. The Franchise Tax Board has no
6 experience with that. Can you get them a redacted copy
7 of a D & R and a hearing summary? Because what the
8 hearing -- because that's what you're modeling this on.

9 And the hearing summary for business tax cases
10 was started because the D & R, there may be ten issues
11 that the taxpayer brought and ultimately things got
12 resolved, and for a hearing there's only two. And Board
13 members and their staff used to have to read through the
14 whole D & R and then figure out what was left to decide.

15 And so the hearing summary now just is very
16 short and has, you know, issue No. 1 is what is
17 blah-dee-blah, and then there's a very, you know, crisp
18 one or two paragraphs about that issue, and then the
19 next issue, so it's kind of like a shrunken of the
20 essence of the D & R.

21 But they're not going to understand what the
22 issue is. They can understand it better, I think, if
23 you give them a copy so they can see kind of what
24 happens in the other.

25 MR. DAVIS: That would be very helpful. Thank

1 you.

2 MS. RUWART: Any specific comments on (d),
3 given that?

4 And Subsection (e), the Board can Order
5 Additional Briefing or Evidence after the Hearing, any
6 significant comments on that, aside from the extreme
7 hardship, is there a comment on that? I assume that
8 came in writing.

9 Joe?

10 MR. VINATIERI: Absolutely.

11 MS. RUWART: Subsection (f), Recommendation of
12 Formal Opinion. We haven't talked about what a formal
13 opinion is, but we'll talk about that later.

14 Is there any issue of about actually recommending that?

15 Moving on to Section 4043, a decision without
16 an oral hearing. You want to just briefly explain the
17 setup here or is this --

18 MR. FOSTER: It's mostly self-explanatory.
19 It's basically just if nobody requests an oral hearing
20 after the D & R issues, then the D & R goes to the Board
21 for consideration as a nonappearance matter the same way
22 that a summary decision in our current practice would go
23 to the Board as a nonappearance matter.

24 MS. RUWART: Given that, are there any
25 questions or comments on subsection (a)?

1 Subsection (b)? Subsection (c)? Subsection (d)? Okay.
2 Very good.

3 MR. VINATIERI: I'm sorry, Carole. This is
4 Joe. I have a question regarding depublication.

5 On occasion there are decisions rendered by the
6 Board that are overturned as a result of a Court of
7 Appeal decision, and there currently is no mechanism to
8 deal with that. And as long as we're talking about
9 changing the rules here, we ought to make sure that
10 there's a provision for depublication.

11 MS. RUWART: Of a formal opinion? Is that what
12 you're talking about?

13 MR. VINATIERI: That's correct.

14 MS. RUWART: Okay. So that would be a global
15 comment about Section 4044, formal opinions. He's
16 bringing up a good point, that we have a historical
17 legacy of formal opinions, some of which may be outdated
18 and obsolete.

19 MR. VINATIERI: Right.

20 MS. RUWART: Do we have a procedure for
21 depublishing them and letting people know they cannot be
22 relied on anymore?

23 MR. VINATIERI: That's correct.

24 MS. RUWART: Okay. Any other global comments
25 on 4044?

1 MR. DAVIS: Carole, excuse me. Again, just to
2 understand the process, are letter decisions and summary
3 decisions still going to be part of the process?

4 MS. RUWART: Why doesn't Ian explain 4044 in
5 that regard?

6 MR. FOSTER: Okay. They're slightly different.
7 Summary decisions will no longer be part of the
8 process. If this goes through, there will not be
9 summary decisions anymore. I'm not sure yet if or how
10 or -- a letter decision would be part or exactly what it
11 would look like. We haven't put details in here about
12 what the notice looks like of the Board's action,
13 because we don't want to write ourselves in a corner.

14 MS. MANDEL: But I thought I heard you say that
15 the D & R would effectively be the new equivalent of a
16 summary decision.

17 MR. FOSTER: Well, the way we wrote it is that
18 the D & R goes to the Board for consideration as a
19 nonappearance matter, leaving open the possibility that
20 the Board could either adopt it or simply issue a letter
21 saying --

22 MS. MANDEL: Right. But in the -- in the
23 situation where the Board -- okay. I'm sorry. In the
24 situation where the Board -- if the Board rejects the
25 D & R because it reaches a different conclusion, then

1 that's where a letter would normally go out; right?

2 MR. FOSTER: Yes.

3 MS. MANDEL: And those letters aren't sort of
4 available. I mean, I don't think they wind up anywhere,
5 even on any tax research website.

6 MR. FOSTER: No. They're public record.

7 MS. MANDEL: Right. They're public record, but
8 they don't become any sort of even informal body of
9 administrative law, whereas, the summary decisions do.

10 And so what you're saying under this is the
11 D & Rs, if adopted by the Board, would be the equivalent
12 of today's summary decisions and be available to CCH and
13 BNA and all of that?

14 MR. FOSTER: We've left those sorts of nuts and
15 bolts open to question.

16 MS. MANDEL: Well, yeah. To the extent -- I
17 mean, one of the complaints that, you know, I've heard
18 over the years, even before I ever was working at the
19 controller's office, I had the same issue, which was
20 that when the Board went to having the nonprecedential
21 decisions as opposed to sort of every decision in income
22 tax being what it was, that there was -- there was less
23 and less of a body of administrative law, which made it
24 very difficult for people to advise clients as to, you
25 know, what things were -- because very few things really

1 wind up in court, you know, historically. And now that
2 the agencies have had settlement authority for so many
3 years, there's even less cases in court than there used
4 to be. And so that's a sort of practical issue for
5 people if -- but I think the D & R is the equivalent of
6 today's --

7 MR. FOSTER: As far as -- I mean, getting a
8 formal body of law that people can rely upon, there's
9 been an outcry from FTB, from tax practitioners, from
10 the State Bar, from everywhere, saying we need to be
11 adopting more formals. And, you know, I can't write
12 regulations, I don't think, that require the Board to
13 adopt --

14 MS. MANDEL: No.

15 MR. FOSTER: -- more formals. But I've tried
16 to write these regulations to encourage the adoption of
17 more formals by setting forth criteria and by
18 encouraging the Appeals Division to provide formal
19 recommendations.

20 MS. MANDEL: Right, right. But even to the
21 extent that the summary decisions are currently
22 available, and the summary decisions have become much
23 more than they originally were, they're much more -- and
24 I suppose that depends on how busy you guys are in
25 Appeals, how much they work on them, but even the

1 availability of those for research purposes gives people
2 some indication of how a case would go, so . . .

3 MR. FOSTER: Yeah.

4 MS. RUWART: Okay. I've kind of lost track of
5 where we are. I think we're still on subsection (a).
6 We've kind of talked about that, unless there's other
7 specific comments? Okay. Subsection (b), just what is
8 the date of the decision? Subsection (c), and maybe
9 this is worth discussion or comments or not, reasons for
10 issuing a formal opinion, several criteria and factors.
11 Yes.

12 MR. DALY: Charles Daly. Are these reasons
13 intended to be exhaustive?

14 MR. FOSTER: No.

15 MS. MANDEL: Then it should sort of have a
16 different phrasing.

17 MR. LANGSTON: Well, they're considered.

18 MS. MANDEL: Right.

19 MR. FOSTER: But it doesn't say "only the
20 following factors."

21 MS. MANDEL: I've had cases, albeit with county
22 assessors, over regulations where this kind of phrasing,
23 "the following factors shall be considered," with four
24 things listed, they would say those are the only things,
25 so . . .

1 MR. LANGSTON: Including, but not limited to.

2 MS. RUWART: Okay. Very good. Subsection (d),
3 the precedential effects of the formal opinion.

4 MR. LANGSTON: I like Joe's comment about
5 somehow depublishing them.

6 Another very common situation is there's a
7 legislative change that affects the statute, and, again,
8 it would be helpful for somehow that to be indicated on
9 the website, you know. Note that -- I know the CCH and
10 other publishers try to do that, but don't always do it
11 right.

12 But, you know, for years after 2002 this was
13 changed.

14 MR. FOSTER: Sure, and I don't know -- if we
15 may not necessarily want to put that in regulations, but
16 we are in the process of redoing a lot of things on the
17 website, and that's the sort of thing that could be
18 added on there, you know, please read this opinion at
19 your own risk.

20 MS. RUWART: And to provide more editorial
21 comments.

22 Moving on to Section 4045, Dissenting Opinions.

23 MS. MANDEL: I just had one comment. We have
24 not made any provision for a concurring opinion.

25 MR. FOSTER: Well --

1 MS. MANDEL: You can have a dissenting opinion.
2 It's always entirely possible there could be a
3 concurring.

4 MS. RUWART: Same result, different analysis.

5 MS. MANDEL: Same result different analysis.

6 There have been formal opinions of the Board in
7 the past where the number of Board members voting
8 affirmatively on a motion was not the same as the number
9 of Board members voting for a formal opinion. And
10 sometimes that's because a particular Board member may
11 not want a formal opinion at all, but sometimes, you
12 know, unbeknownst to the world, it may be because a
13 Board member agrees with the result but has a different
14 view.

15 And if you're going to start making provisions
16 for dissenting opinions, I mean, I don't know, members
17 may want to say, well, then, I want to -- I want to be
18 able to have a concurring opinion.

19 MS. RUWART: Probably all -- that's an
20 excellent idea.

21 That said, Subsection (a), anything in
22 particular? Just, again, it gives the appeals division
23 the task of preparing this dissenting opinion.

24 Subsection (b), the date, just the date and the
25 effect of that ?

1 And Subsection (c), a parallel provision of
2 precedential value?

3 Section 4046, Frivolous Appeal Penalty, is
4 there anything in here, Ian?

5 MR. FOSTER: This is -- this is substantially
6 similar to the prior version posted on the web and also
7 incorporates our existing practices.

8 MS. RUWART: Any particular comments on (a)?

9 MS. BORGMAN: This Susan Borgman.

10 I think you should add the claimants into this,
11 into this provision, since you're only addressing
12 taxpayers since the Board has to impose penalties for
13 HRA cases.

14 MS. RUWART: Okay. Very good. Any others on
15 the global concept or (a)?

16 (b)?

17 (c)?

18 (d)?

19 (e)?

20 Very good.

21 Now, on to Article 5. Well, we really have
22 three minutes, but again we'll take as much time as we
23 need to, but we will have herds of people coming in here
24 at 1:30.

25 MS. MANDEL: And staff needs, you know,

1 sustenance and fortification for that meeting.

2 MS. RUWART: Staff will be a lot happier in the
3 afternoon if staff gets a chance to eat lunch.

4 MR. FOSTER: I could point out real quickly on
5 all of this, Article 5 is substantially similar to what
6 was numbered as Article 6 in the prior version posted in
7 September.

8 It's been amended to be renumbered, and we've
9 made some minor grammatical technical changes here and
10 there, but substantially it's all the same, I think.

11 MS. RUWART: Very good. This deals with, the
12 first part, 4050 is the Finality of Decision. Any
13 global comments or comments on Subsection (a)?

14 MR. LANGSTON: Bruce Langston for Franchise Tax
15 Board.

16 You know, we have had litigation on this issue
17 and the problem that we are constantly being faced with,
18 and taxpayers are, is until a written decision or
19 opinion comes out, it's not always clear to the taxpayer
20 how they can either file a petition for rehearing or go
21 to court in the case of a refund action.

22 And I'm not suggesting -- I mean, this is just
23 a general comment to consider saying that for purposes
24 of either choosing to file a petition for rehearing or
25 going to court, the decision be final when the written

1 decision is issued.

2 MS. MANDEL: This is Marcy.

3 That's why -- we haven't really had it lately,
4 but maybe with all this stuff, you would need it.

5 But the Board used to be very careful if it
6 ordered a formal opinion to be written on a franchise
7 tax case because the time to file for rehearing is very
8 different in franchise and income tax matters than it is
9 in business tax matters. What it keys off of in
10 franchise tax matters, it keys off the Board's decision,
11 so if the Board affirmatively votes on a case and then
12 orders an opinion, what we used to make sure of was that
13 it wasn't really voted on until the opinion came back
14 for adoption, so that that was -- was the key date, for
15 example, and whereas in sales tax, they don't have to
16 petition until they get that notice of redetermination.

17 So it's a very --

18 MR. SHALTES: This is Craig Shaltes.

19 We still do that. It says it's not final until
20 the Board adopts what is drafted by the appeals.

21 MS. MANDEL: But to the extent that staff is
22 drafting a regulation that would make less clarity,
23 you've got to make sure you watch out for that.

24 MS. RUWART: Good action on that.

25 Anything else on Subsection (a)?

1 MR. DAVIS: This is Ken Davis.

2 We're suggesting we add back in at page -- a
3 section in the current one that we think is a good one,
4 and that's, "Either party may file only one petition for
5 rehearing."

6 MS. RUWART: For clarification.

7 Subsection (b), is there a need to explain
8 this? Well, actually, (b) has a lot of sub-elements.

9 MR. FOSTER: Yeah. It's -- well, there's some
10 reason behind it. We have this oddly-written statute
11 that says the decision is final 30 days after it's
12 adopted. And there's always this debate, well, what
13 does that mean? Why is there a 30-day period? What's
14 30 days? What's final?

15 There have been cases where the Board -- you
16 know, prior to that 30-day period ending, the Board or
17 staff discovers there's a clerical error or somebody
18 lied and we have relied upon that lie, there's a
19 misrepresentation, some other problem, or somebody's had
20 their rights denied, like they requested an oral hearing
21 and we forgot to grant it. And what we're looking for
22 here is a mechanism to correct the decision that -- the
23 reason for all the detailed procedure here is that often
24 there isn't a regularly scheduled Board meeting to
25 expunge the vote within that 30-day period.

1 MS. MANDEL: Yeah. The Board used to meet more
2 often.

3 MR. FOSTER: Yeah. And it's a practical
4 problem to get the Board members together sooner just to
5 vote to expunge one decision. So we put in this
6 procedure where the Board chair, within that 30-day
7 period, can hold it in abeyance, and then at the next
8 regularly scheduled Board meeting there would be the
9 expunging vote. And essentially our feeling is that the
10 Board, if they adopt this procedure and regulation,
11 would be essentially delegating that authority to the
12 Board chair.

13 MS. MANDEL: Then do you -- well, you maybe
14 don't have to have it in here, but somebody might -- I
15 know there was something somewhere else where it was a
16 Board member request or the Board chair or -- but I
17 suppose they could always do that, but I'd have to find
18 that in the regs.

19 MR. BRUCE LANGSTON: Bruce Langston. The only
20 other comment is, that procedure is not really
21 authorized by the statute. If you read the statute, it
22 basically says the determination becomes final on
23 30 days unless one of the parties files a petition for
24 rehearing. So, you know, that would -- that should be
25 addressed one way or another. I mean, that's a perfect

1 legislative change proposal. I mean, everyone agrees
2 this is a good government kind of thing to do, but what
3 we don't want is somebody citing the statute, saying,
4 sorry, it became final, I won, even though one of these
5 things happens.

6 MS. RUWART: Good comment.

7 Let's take subsection (b) (1), which is the
8 reasons under which the chair may make this order;
9 (b) (2), notification; (b) (3), exactly the next step in
10 the process, I suppose; (b) (4), how it all goes down
11 with the vote; (b) (5), a chance to reconsider; and
12 (b) (6), the last step of the procedure.

13 People may want to take a closer look at this,
14 but if there's no particular comments, I'll move on to
15 4051, the petition for rehearing under the reply.
16 Subsection (a) is definitions. Ian, did you have any
17 general comments or . . .

18 MR. FOSTER: Basically that this is essentially
19 similar to the prior version. Just had some renumbering
20 in it. And it's basically consistent with existing
21 practice.

22 MS. RUWART: Subsection (a), definitions;
23 subsection (b), the petition for rehearing filing,
24 references back; subsection (c), accepting or rejecting
25 the petition. Any comments on (c) (1)? (c) (2)? (c) (3)?

1 Subsection (d), the briefing schedule. (d) (1)? (d) (2)?

2 Very good.

3 Moving on to Section 4052, the decision on the
4 petition for rehearing. Ian?

5 MR. FOSTER: My same comments as a few seconds
6 ago.

7 MS. RUWART: Okay. Subsection (a), defining a
8 decision on rehearing. Any comments? Subsection (b),
9 the Appeals Division prepares the decision; subsection
10 (c), additional briefing and evidence; subsection (d),
11 the date of the decision and adoption.

12 MR. LANGSTON: I have one comment. Bruce
13 Langston. In this situation, and not to be pedantic,
14 but let's say January 1st was the original decision.
15 Somebody requests a petition for rehearing, which is
16 what this is. It seems to me the -- we just need to
17 clarify that the entire action doesn't become final
18 until the petition is denied. Unless I'm missing
19 something, I didn't see that here. Just, again, because
20 the final action starts all sorts of deadlines like
21 collection actions by FTB, refund court filings. And so
22 we'll put this in writing, but we just want to be
23 crystal clear what that date is so there's no ambiguity
24 about it.

25 MR. FOSTER: Very good comment.

1 MS. RUWART: Anything else on subsection (d)?
2 Moving to subsection (e), the reasons for granting a
3 rehearing, five different reasons; (e) (1); (e) (2);
4 (e) (3).

5 MS. MANDEL: These are basically the Wilson --

6 MS. RUWART: Yes. (e) (4) and (e) (5). So what
7 we're probably looking for here is just phrasing and
8 ambiguity, so people can think about that. And
9 subsection (f), no precedent, no lack of precedential
10 value.

11 Moving on to section 4053, rehearings
12 themselves. Subsection (a) is the briefing schedule.
13 Do we have any global comments on this section?

14 MR. DAVIS: This is Ken Davis. One thing we
15 just would like staff to maybe clarify a little bit
16 more, and maybe it's through headings or just the
17 difference between the petition for rehearing and the
18 rehearing process, just because the -- it appears to be
19 a two-step process. One is petition. You've got to
20 petition. You've got an elongated process for petition,
21 briefing and decision for the petition process, and then
22 you've got the next level, which is the granted
23 rehearing process, which has its own level, but is
24 actually the substance, so it goes back to the final
25 decision. So that's . . .

1 MS. RUWART: Okay. So (a) (1), (a) (2), (a) (3),
2 (a) (4), and (a) (5), that's just the briefing schedule
3 considerations. Moving on to subsection (b), the
4 hearing and decision, Subsection (b) (1)? (b) (2)?

5 Subsection (c), no precedential value?

6 Subsection (d), the finality of the Decision,
7 do you have any specific comments on that, Bruce?

8 MR. LANGSTON: We're going to put all of these
9 together and do it in writing, because I want it to --

10 MS. RUWART: Okay. Great.

11 MS. MANDEL: Read it and think.

12 MR. LANGSTON: -- yeah, kind of see how this
13 fits into the other ones.

14 MS. RUWART: At this point in time, I'd like to
15 invite any burning comments, anything that you feel you
16 want to say here and now in this forum.

17 MS. CROCETTE: Let's go to lunch.

18 MS. RUWART: And seeing none, I would like to
19 thank you all for coming, participating, being extremely
20 thoughtful. We really appreciate all of this, to the
21 greatest extent possible, in writing. We will consider
22 everything, and, as Brad said, provide the revised
23 version on the schedule as soon as possible.

24 And with that, I think, unless Brad has
25 anything more to add.

1 MR. HELLER: No, other than we'll be meeting
2 again at 1:30 to discuss Part 5, which contains the
3 communications with Board members provisions and
4 disclosure provisions, so we'll be discussing it at that
5 time. So please enjoy the 45 minutes that we have
6 planned for you.

7 MS. RUWART: Yes, see you at 1:30.

8 (The proceedings were adjourned at 12:41 p.m.)

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I, CAROLE W. BROWNE, Certified Shorthand
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Dated: December 29, 2005

Carole W. Browne, CSR
Certificate No. 7351

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